NO. 80-221

SEP 17

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, CLC, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 775 and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 758,

Petitioners,

-against-

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and CHRYSLER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT, CHRYSLER CORPORATION, IN OPPOSITION

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Dated: September 17, 1980

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QUESTIONS PRESENTED

The Respondent, Chrysler Corporation, objects to the Question Presented by Petitioner and submits that the Question Presented is instead:

> Does a Trial Court abuse its discretion granted under Rule 53 of the Federal Rules of Civil Procedure when it orders a party who significantly participated in the pleadings before the Court to bear an equal share of the compensation ordered a Master?

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OPINIONS BELOW

The opinions delivered in the courts below are not yet reported but are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

RULES INVOLVED

Respondent agrees with Petitioner's reference to Rule 53 (a) of the Federal Rules of Civil Procedure but submits that Rule 54 (d) is also at issue in pertinent part:

> " (c) osts shall be allowed as of course to the prevailing party unless the court otherwise directs."

STATEMENT OF THE CASE

Respondent Chrysler Corporation ("Chrysler") agrees to the first three paragraphs of the Petitioner's Statement of the Case, except to note that the Unions were joined as parties pursuant to paragraph 10 of the Complaint.

Chrysler also agrees that the Unions moved to be realigned as plaintiffs, but objects to their footnote 1 as irrelevant to the question before this Court. Chrysler filed a memorandum contra the motion of the Unions to be realigned as party plaintiffs. Chrysler noted that none of the grievances which were appealed by the Unions to the appeal board concerned alleged discrimination because of sex.[1] Chrysler further argued that if discrimination had oc-

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[1] The Union's attempt to associate themselves with discrimination suits filed by the international IUE is absurd when the record of the locals is reviewed. The Unions have replied piously that they avoided taking grievances to binding arbitration because this would have jeopardized their members' rights under the Doctrine of *Dewey* v. *Reynolds Metals Company*, 429 F.2d 324 (6th Cir. 1971). However, despite the repudiation of *Dewey* in *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36 (1974), the Unions still failed to process a single case of alleged sex discrimination.

curred against members of the Unions, the Unions were jointly liable with Chrysler, and the Unions should remain party-defendants.

The District Court denied the Unions' motion for the reasons stated in Chrysler's memorandum. Later, the Unions moved for reconsideration of their motion to be realigned as plaintiffs, and again the District Court denied the motion. Chrysler agrees that the Unions admitted the allegations of the complaint and cross-claimed against Chrysler. Chrysler answered the cross-claim of the Unions, and stated in part that the Unions could not recover as to the extent any discrimination existed, it was as a direct result of collective bargaining agreements which the Unions had negotiated.

Chrysler moved to dismiss certain claims of the EEOC's complaint, and of the Unions' cross-claim regarding pregnancy benefits. The Unions filed a memorandum contra to Chrysler's motion to dismiss and stated that they intended to file interrogatories to Chrysler.

Chrysler agrees that a master was appointed with the provision that if the parties were unable to agree, the District Court would charge his compensation as it subsequently determined. Chrysler agrees that the settlement agreement appended to the Petition is accurate, but notes that said agreement recites that the Unions were joined as "parties" to the action, and that they joined in a motion to approve the agreement. The joint motion stated that the agreement resolved all matters in controversy between the "parties." The EEOC-Chrysler settlement agreement provided that "Each party agrees to bear its own costs and fees expended in the litigation of the instant action." Appendix E to petition, page 23 (a).

After the settlement agreement was filed, the Unions

requested from Chrysler copies of the reports which the agreement required to be submitted to the EEOC.

After the master had submitted his statement for services, Chrysler's attorney, Roger J. Makley, obtained a commitment by telephone from Richard F. Rice, an attorney for the Unions, that the Unions were agreeable to paying one-third of the master's fee. Shortly thereafter, Richard B. Sobol, another attorney for the Unions, responded by letter that Mr. Rice had made no such commitment and that it was the Union's position that they should not bear any portion of the expenses. When agreement among the parties could not be reached, the matter was submitted to Judge Rubin for his determination.

Chrysler agrees that the opinions of the District Judge and the Court of Appeals appended to the petition are accurate, but notes that the opinion of the District Judge was that the "participation in terms of pleading before this court was significant." Petition Appendix B, (p. 7 (a).

REASONS FOR NOT GRANTING CERTIORARI

The Petition should be denied because it does not include proof of service and only one copy was served upon Chrysler. Rule 28, Rules of the Supreme Court, requires that proof of service be noted and that three (3) copies of a document produced under Rule 33 be served on each party. A petition for a writ of certiorari is a document produced under Rule 33.

The Petition also should be denied because there is insufficient reason to hear it.

Rule 17.1, Rules of the Supreme Court, provides: " (a) review on writ of certiorari is not a matter of right but

of judicial discretion, and will be granted only when there are special and important reasons therefor."

No constitutional issue is presented by the Petition. Instead, the Unions argue that "an important question of federal law" is raised. Chrysler submits that the issue presented is simply one of the trial court's discretion.

In *United States* v. *Nobles,* 422 U.S. 225, 241 (1975), this court noted in footnote 16 that the respondent argued that the trial judge erred in his exclusion of purported expert testimony.

> ". . . (w) e do not consider these contentions worthy of consideration. Each involves an issue that is committed to the trial court's discretion. In the absence of a strong suggestion of an abuse of that discretion or an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them."

Rule 53 (a) F.R.Civ.P. states the master compensation "shall be charged upon such of the parties . . . as the court may direct." This plainly leaves the matter within the discretion of the district court. The Unions argue that the district court abused its discretion because Rule 54 (d) F.R.Civ.P. provides that costs shall be allowed to the prevailing party. However, the Unions omit the full quotation which is: ". . . (c) osts shall be allowed as of course to the prevailing party *unless the court otherwise directs.*" (emphasis added). Hence, Rule 54 (d) F.R.Civ.P. also leaves the ultimate decision to the district court's discretion. See *K-2 Ski Company* v. *Head Ski Company, Inc.,* 506 F.2d 471 (9th Cir. 1974).

The record plainly supports the district court's judgment that the Unions actively participated in the lawsuit.

The Unions also shared with Chrysler the responsibility for any violations alleged by the EEOC inasmuch as they had negotiated the collective bargaining agreements. Hence, the Unions were as much responsible as Chrysler for the existence of the lawsuit and the subsequent reference to a master. If the EEOC action had been dismissed, the EEOC might have been found liable for all costs. However, since the suit was settled by an agreement in which the Unions concurred, the district court considered it appropriate to divide the costs equally between the three parties.

Numerous cases have required the parties to share the master's fee. See e.g., *Bowen Motor Coaches* v. *New York Cas. Co.*, 139 F.2d 332, 334 (5th Cir. 1943); and *Woods* v. *Prelet,* 187 F.2d 453 (7th Cir. 1951). The Court of Appeals reviewed the allocation in the instant case and found no abuse of discretion. The Unions have not made anyway near a sufficient showing of abuse of the district court's discretion. Therefore, this Court should decline to review this issue.

Assuming *arguendo* that the district court did abuse its discretion in this case, an important question of federal law still is not presented. In future cases, whether or not a union should bear part of the master's fee will turn on the particular circumstances of the case. The Unions argue that a precedent has been set which will make Unions seek a passive role in such litigation. However, Unions in later cases might object to the appointment of a master if they are concerned about costs.

The Unions' real dilemma is that they want to have their cake and eat it too. They are willing to "assist" the EEOC in its complaint; but with the result that if the complaint fails the EEOC bears the costs and if the com-

plaint is settled the EEOC and the Employer bear the costs. The solution in a future case is for a union to decide first it it wishes to aid the EEOC. If so, it should ask to be realigned as a plaintiff. Then, if the EEOC prevails, it is likely the employer will bear the master's fee. In the instant case, the Unions failed in their attempt to be realigned as a plaintiff because they shared the responsibility for the conditions with Chrysler. No doubt, if Chrysler had been found to have prevailed in this action, the Unions would assert that they were co-defendants and could not be charged when the EEOC had "lost." Certainly, when no party has prevailed it is only fair to charge the Unions the same amount charged Chrysler.

CONCLUSION

The writ of *certiorari* should be denied.

Respectfully submitted,

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